NEW LIMITATIONS UPON STATE REGULATION OF RAILROAD RATES

With the physical development of the great net-work of railroads in the United States and the ever increasing tendency toward more stringent public regulation, it was inevitable that the respective powers of the state and Nation would require judicial interpretation. As a result there has grown up, particularly in the last thirty years, a considerable body of judicial precedent defining the limitations upon each.

Speaking generally, the tendency of judicial decision during this period has been to uphold as constitutional each new assertion by Congress of its power over railroad rates, even though in derogation of the police powers of the state previously exercised. So firmly have the courts inclined to the nationalistic concept of the railroad and railroad regulation that in some respects their decisions have actually blazed the way for new assertions by Congress of increased National authority.

Now that Congress in its most recent railroad legislation, entitled the "Transportation Act, 1920," approved February 28, 1920, has placed further limitations upon state regulation, it is not out of place to consider the bases upon which the constitutionality of such limitations must rest. Such a consideration leads to the conclusion that ample support for the new limitations may be found in judicial precedent.

In pursuing this inquiry, only those features of the new legislation which relate primarily to an extension of National authority over intrastate rates will be discussed, for provisions of the same Act delegating new powers to the Interstate Commerce Commission in respect to interstate rates may involve consideration of constitutional law and statutory interpretation beyond the scope of the present title.

I

Constitutional Bases of Congressional Limitations

Those who have considered the power of Congress to legislate respecting intrastate rates, in the absence of Federal incorporation of railroads, have generally grounded such power as may exist upon one of three of the enumerated grants contained in the Federal constitution. These are the grants of power to Congress (*a*) to

regulate interstate and foreign commerce, (*b*) to establish post-offices and post roads, and (*c*) to prosecute war and provide for the common defense and general welfare.

1. Congress has exclusive power to regulate interstate and foreign commerce—state regulations conflicting with the exercise of this exclusive power are subordinated thereto.

The exclusive character of the Federal power over interstate commerce was not clearly defined in the early railroad cases. The decisions in the Granger Cases of 1876 contain *dicta* to the effect that not only may the states regulate intrastate rates, but that until Congress acts in respect to interstate rates, the latter may also be regulated by the states.[1] Such *dicta* were not warranted by previous decisions construing the power of Congress to regulate interstate commerce.[2] They did not long survive. Since 1886 judicial construction has clearly recognized the exclusive character of the power of Congress over interstate commerce.[3] State regulation of railroad rates can in no event extend to interstate rates, the prohibition extending to rates applicable to any part of transportation constituting interstate commerce.[4] While the principle was definitely enunciated at that time that the states could not regulate any rate applying to interstate commerce in whole or in part, the courts, consistent with prior decisions, declined in the absence of Congressional *fiat*, to hold void regulations of purely intrastate rates on the ground that such regulations indirectly injured and interfered with interstate commerce.[5] The underlying theory of this differentiation was that the grant of exclusive power to Congress over interstate rates was an express grant; such rights as Congress might have with respect to intrastate rates in order to prevent interference with the former must depend upon an implied grant to make effective the regulation of interstate commerce which had expressly been entrusted to its care. In some decisions

[1]"Until Congress acts in reference to the relations of this company to interstate commerce, it is certainly within the power of Wisconsin to regulate its fares, etc., so far as they are of domestic concern . . . Incidentally these may reach beyond the State. But certainly, until Congress undertakes to legislate for those who are without the State, Wisconsin may provide for those within, even though it may indirectly affect those without." Peik *v.* Chicago & N. W. Ry. (1876) 94 U. S. 164, 178. See also Chicago, B. & Q. R. R. *v.* Iowa (1876) 94 U. S. 155, 163.

[2]William C. Coleman, The Evolution of Federal Regulation of Intrastate Rates: The Shreveport Rate Cases, 28 Harvard Law Rev. 34, 51-53.

[3]Wabash, St. L. & P. Ry. *v.* Illinois (1886) 118 U. S. 557, 7 Sup. Ct. 4.

[4]Louisville & N. R. R. *v.* Eubank (1902) 184 U. S. 27, 22 Sup. Ct. 277.

[5]Smyth *v.* Ames (1898) 169 U. S. 466, 18 Sup. Ct. 418.

this line of demarcation was stated as the difference between *direct* and *indirect* burdens cast upon interstate commerce, the courts assuming to enjoin the operation of direct burdens but declining to intervene as to indirect burdens in the absence of Congressional legislation.[6] This thought was restated in *The Minnesota Rate Cases*:[7]

"But these considerations are for the practical judgment of Congress in determining the extent of the regulation necessary under existing conditions of transportation to conserve and promote the interests of interstate commerce. If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply."

This is but a specific application of Chief Justice Marshall's famous test: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited but consist with the letter and spirit of the Constitution, are constitutional."[8] The Supreme Court in *The Minnesota Rate Cases* indicated with direct statement that a regulation by Congress of intrastate rates as a necessary means of regulating interstate commerce would not be considered inappropriate in the light of the modern development of railroad transportation and the interblending of transactions without regard to state lines. The following additional quotation from its decision illustrates this:

"The authority of Congress extends to every part of interstate commerce, and to every instrumentality or agency by which it is carried on; and the full control by Congress of the subjects committed to its regulation is not to be denied or thwarted by the commingling of interstate and intrastate operations. This is not to say that the Nation may deal with the internal concerns of the State, as such, but that the execution by Congress of its constitutional power to regulate interstate commerce is not limited by the fact that intrastate transactions may have become so interwoven therewith that the effective government of the former incidentally controls the latter. This conclusion necessarily results from the supremacy of the National power within its appointed sphere."[9]

[6]Atlantic Coast Line *v.* Wharton (1907) 207 U. S. 328, 28 Sup. Ct. 121.
[7](1913) 230 U. S. 352, at 432, 33 Sup. Ct. 729.
[8]McCulloch *v.* Maryland (1819) 4 Wheat. (17 U. S.) 316.
[9]The Minnesota Rate Cases (1913) 230 U. S. 352, at 399, 33 Sup. Ct. 729.

Shortly before this decision, a Congressional regulation of safety appliances on all railroad cars of interstate carriers, regardless of their use in intrastate or interstate commerce, had been upheld.[10] Subsequently it was decided that the protection of the Safety Appliance Act extended to all employees of interstate carriers, although at the time of injury they might have been engaged in purely intrastate commerce.[11]

Until the passage of the Transportation Act of 1920, Congress had undertaken the regulation of intrastate rates in only one particular. In Section 3 of the Act to Regulate Commerce as enacted in 1887 it had declared that the rates of interstate carriers should not result in undue preference or prejudice to persons, localities, or descriptions of traffic, "in any respect whatsoever." By amendments to other sections contained in the Hepburn bill of 1906, the Interstate Commerce Commission was given authority to make orders requiring the removal of such preferences as it found to exist. When presented with a finding of undue preference and an order of the Commission requiring its removal, the Supreme Court upheld the validity of the action and the constitutionality of the legislation, even though the effect was to increase state rates without the consent of the state, for the undue preference was found to exist by reason of a disparity between the level of intrastate and interstate rates and the interstate rates were found not to be unreasonably high.[12] "Wherever," said the Court, "the interstate and intrastate transactions of carriers are so related that the government of one involves the control of the other, it is Congress, and not the State, that is entitled to prescribe the final and dominant rule, for otherwise Congress would be denied the exercise of its constitutional authority and the State, and not the Nation, would be supreme within the national field."[13]

2. Congress under its enumerated power "to establish post-offices and post roads" may make all necessary provision for the transportation of the mails and to prevent interference therewith.[14]

[10]Southern Ry. *v.* United States (1911) 222 U. S. 20, 32 Sup. Ct. 2.

[11]Texas & P. Ry. *v.* Rigsby (1916) 241 U. S. 33, 36 Sup. Ct. 482.

[12]Houston, E. & W. T. Ry. *v.* United States (1914) 234 U. S. 342, 34 Sup. Ct. 833.

[13]*Ibid.*, at p. 351.

[14]*In re* Debs (1895) 158 U. S. 564, 15 Sup. Ct. 900. See Lindsay Rogers, The Extension of Federal Control Through the Regulation of the Mails, 27 Harvard Law Rev. 27.

3. Congress under its so-called war powers (Constitution of the United States, Article I, Section 8, paragraphs 11, 12, 13 and 14) may assume such control of or regulation over railroads as to completely divest the states of all power of rate regulation.

During the period of Federal control of railroads recently terminated, the President exerted the right under a definition of power contained in Section 10 of the Federal Control Act,[15] to initiate rates for general application, regardless of the intrastate or interstate character of the commerce involved. North Dakota and other states resisted this assertion of right, rather, however, on the ground of lack of warrant in the Federal Control Act as a matter of statutory construction than on constitutional grounds. But the decision of the Supreme Court was clear both as to constitutionality and interpretation, holding that the right of the President to initiate rates was in no way limited by state law.[16] "The complete and undivided character of the war power of the Nation," said Chief Justice White, "is not disputable." In upholding the legality of the initiation of intrastate rates, the court gave particular consideration to the fact that the United States had assumed financial obligations in respect to railroad operation and that, in order to carry out the purposes for which the control of railroads had been assumed, it must have exclusive authority to place rates on a basis necessary to meet operating costs. In another decision rendered contemporaneously the court upheld the right of the President to fix tolls for intrastate communication by telegraph and telephone where these properties were likewise under Federal control.[17] Here also the constitutionality was rested upon the war power of the Nation, but a new and significant statement of the basis of state regulation appears:

"Inherently the power of a State to fix rates to be charged for intrastate carriage or transmission is in its nature but derivative, since it arises from and depends upon the duty of those engaged in

[15]This provision provided "that during the period of Federal control, whenever in his opinion the public interest requires, the President may initiate rates, fares, charges, classifications, regulations and practices by filing the same with the Interstate Commerce Commission, which said rates, fares, charges, classifications, regulations and practices shall not be suspended by the Commission pending final determination."

[16]Northern Pac. Ry. *v.* State of North Dakota (1919) 250 U. S. 135, 39 Sup. Ct. 502. See Henry Wolf Bikle, State Power over Intrastate Railroad Rates during Federal Control, 32 Harvard Law Rev. 299.

[17]Dakota Central Telephone Co. *v.* State of South Dakota (1919) 250 U. S. 163, 39 Sup. Ct. 507.

intrastate commerce to charge only reasonable rates for the services by them rendered, and the authority possessed by the State to exact a compliance with that duty."[18]

It is therefore settled law that the paramount National authority may exclude the states from the exercise of any regulatory control whatsoever over railroad rates. Neither a cessation of hostilities, nor even a formal termination of the war, serves to exhaust the authority of Congress under its war powers, for it may constitutionally enact necessary legislation to promote a return to a peace time status.

"The power is not limited to victories in the field and the dispersion of the insurgent forces. It carries with it inherently the power to guard against the immediate renewal of the conflict, and to remedy the evils which have arisen from its rise and progress."[19]

II

Limitations Contained in Transportation Act of 1920

New limitations upon state regulation of intrastate railroad rates may be grouped for purposes of discussion under two heads: (a) Limitations operative by legislative act and adopted as new and independent legislation, and (b) limitations dependent upon subsequent action of the Interstate Commerce Commission and adopted as amendments to the Act to Regulate Commerce.

(a) Limitations Operative by Legislative Act

Limitations of the first described class are contained in the Transportation Act of 1920 in Section 208 under the heading "Existing Rates to Continue in Effect," this being a part of the act designated under Title II as "Termination of Federal Control." The section is not enacted as directly amendatory to the Act to Regulate Commerce, but as separate legislation. Its more salient provisions are set forth in the margin.[20]

[18] *Ibid.*, at p. 187.

[19] Stewart *v.* Kahn (1870) 78 U. S. 493, 507; Hamilton *v.* Kentucky Distilleries, *etc.* Co. (1919) 251 U. S. 146, 161, 40 Sup. Ct. 106.

[20] Sec. 208. (a) All rates, fares, and charges, and all classifications, regulations, and practices, in any wise changing, affecting, or determining, any part or the aggregate of rates, fares or charges, or the value of the service rendered, which on February 29, 1920, are in effect on the lines of carriers subject to the Interstate Commerce Act, shall continue in force and effect until thereafter changed by State or Federal authority, respectively, or pursuant to authority of law; but prior to September 1, 1920, no such rate, fare, or charge shall be reduced, and no such classification, regulation, or practice shall be changed in such manner as to reduce any such rate, fare, or charge, unless such reduction or change is approved by the Commission.

In general, the effect of this section is, as its heading states, to continue in effect upon the return of the railroads to corporate management the rates, regulations, *etc.*, which were in force on the last day of Federal control. Practically all of these rates and regulations had been initiated by the President during the Federal control period and constituted increases over the rates which were in effect at the time the Nation commandeered the railroads from their owning corporations. The major part of such increases had been made by a general order of the Director General of Railroads, acting under authorization of the President, which was contemporeaneous in date with another general order increasing the wages of railroad employees.[21] The first of these orders was obviously designed to aid in securing additional revenue to meet such increased costs of operation and to prevent a stoppage of these arteries of commerce through labor difficulties, or otherwise. Except for the legality of the exercise by the Nation of a dominant and untrammelled authority over intrastate as well as interstate rates, it would have been necessary to have secured approval of these rate increases by various state regulatory commissions, and in many instances to have awaited the repeal of maximum rate statutes by the state legislatures. Throughout the Middle West, state statutes were generally in effect forbidding intrastate passenger fares in excess of two cents a mile, and other states by legislative enactment had provided maximum rates for some descriptions of freight traffic beyond which the state commissions were without power to authorize advances. All difficulties of this character were avoided by the dominant and exclusive nature of the National control under which the President's authority to initiate increased rates was operative, regardless of the state or interstate character of the commerce involved.

With the issuance of the President's Proclamation dated December 24, 1919, which terminated Federal control on March 1, 1920, much speculation was evoked as to the future status of these rates. Increased costs of operation had continued, there was no prospect for an early establishment of a lower wage scale, and the state legislatures had adjourned without repealing their maximum rate statutes.

At the time of their initiation by the President, the increased rates had not been filed with state regulatory officers, but shortly

[21]As to rates, General Order 28 of W. G. McAdoo, Director General of Railroads, dated May 25, 1918; as to wages, General Order 27, same date.

before the termination of Federal control a tender of them was made to the state commissions for filing. Some states rejected the rates on the ground that the advances had not been made in conformity with state law, or that the state officers were without power to file rates which exceeded maximum rate statutes; others gave their specific approval to the filing; and still others took neither negative nor affirmative action. One state in the last weeks of Federal control undertook by specific order to suspend the operation of all the increased and Presidentially initiated rates immediately upon the resumption of corporate management and until such time as the railroad corporations should have made a justification of the rates and secured the approval of the state commission in conformity with the provisions of a state statute relating to increases in rates.

The resulting effect upon the rates made during Federal control of a termination of that control without additional legislation was a much-mooted question. It had been held by the New York Public Service Commission that upon the relinquishment of a small railroad from Federal control the lawful rates were those which had been filed with the Commission prior to Federal control, notwithstanding the fact that subsequent thereto and while the road was under Federal control, the President had increased the rates in conformity with Section 10 of the Federal Control Act.[22] This view was said by some to have support in decisions made following the repeal by Congress in 1878 of the Federal Bankruptcy Act of 1867, where it was said: "The repeal of the Bankruptcy Act of the United States removed an obstacle to the operation of the insolvency laws of the state, and did not render necessary their reënactment."[23]

It seems more likely, however, that the courts would have held the increased rates to be continued in effect until thereafter changed by affirmative act of the revived state authority. Such rates constituted the only existing body of rates. The rates previously in effect had been superseded by rates made under the lawful authority of the Nation. The status of the latter rates, and the existing state of facts created by the lawful exercise of National authority, should under familiar principles be presumed to continue until lawfully changed. To have conceived of their being automatically

[22]Maloney *v.* Norwood & St. L. R. R., Public Utility Reports, 1919-A, p. 598.

[23]Butler *v.* Goreley (1892) 146 U. S. 303, 314, 13 Sup. Ct. 84. See also Tua *v.* Carriere (1886) 117 U. S. 201, 6 Sup. Ct. 565.

abrogated by the incidence of previously enacted maximum rate statutes at the end of Federal control would have left the railroad corporations with no rates at all. Their former rates had been superseded under lawful authority and the rate schedules containing them had been cancelled and withdrawn. A new status had been created of which the maximum rate statutes, if given renewed force, would have been wholly destructive. Herein lies the material difference between this situation and the revival of state insolvency laws which are *remedial* in character. When the remedies provided by the National act were withdrawn, the obstacle to utilization by debtors and creditors of remedies provided by state statute was removed. But in so far as there had been proceedings under the National act or the creation of a status thereunder, the state statute did not serve as a destroying agency. Thus debts which had been discharged under the National act were not revived, even though not barred by the provisions of the restored state law.

A conception of the establishment of a freight rate as determinative of an existing status until changed is not new to the courts. In 1913 the Court of Claims rested a decision adverse to the Federal Government in part upon this principle. Speaking of a commodity rate in controversy, it said: "However fixed, it was the established rate until changed in some manner allowed by law. * * * In other words a commodity rate once established remains in force until changed as a commodity rate."[24] And the Supreme Court defined the nature of a tariff of freight rates by declaring that "so long as it was of force" it was "to be treated as though it had been a statute, binding as such upon Railroad and shipper alike."[25]

There is an analogy between this conception of a continuing status of lawfully initiated rates after the lapse of the Federal power under which they were made and the effect given to the legal tender acts of 1862 and 1863. The Supreme Court in its majority opinion upheld the constitutionality of these acts exclusively upon the war powers of Congress.[26] But the status created by the exercise of that power (namely the status of treasury notes as legal tender) continued in effect after the declaration of peace and after the war power had ceased to be operative. Thus *Knox*

[24]Union Pacific R. R. *v.* United States (1913) 48 Ct. Cl. 99, 109.

[25]Pennsylvania R. R. *v.* International Coal Mining Co. (1913) 230 U. S. 184, 197, 33 Sup. Ct. 893.

[26]Legal Tender Cases (1870) 12 Wall. 79 U. S. 457.

v. *Lee,* one of the original cases presented to the court under the general caption of the "Legal Tender Cases", involved the propriety of a charge to the jury in 1867 directing attention to the fact that treasury notes were legal tender at that time. Thereafter there appears to have been a complete acquiescence in the conception that these notes continued to have the qualities thus lawfully imparted to them so long as they remained in circulation. No attack was made upon their continuing validity as legal tender until in 1878 Congress undertook to provide for their redemption and reissue and to impart to the reissued notes the legal tender qualities of the originals. In order to sustain the constitutionality of this peace-time legislation the court was compelled to resort to a construction of the power of Congress to borrow money and to provide a National currency which it had declined to adopt in the earlier case.[27] Yet it was not suggested that such a construction was originally necessary in order to have continued the lawfully created status of the original notes throughout the intervening period. It was the tacitly accepted principle that their status imparted as a constitutional exercise of the war power would continue, even after that power had ceased to function, until changed by appropriate legislation. This is an application of the more general rule that the validity of proceedings taken under the war power is not to be impeached or rights thereby created to be vitiated upon the termination of war.[28] If the courts had inclined to sustain the continuance of the initiated rates in spite of the restoration of state power it would doubtless have been on some such analogy as this.

If there had been no additional legislation and if the courts should not have adopted the theory of a continuing status until changed by affirmative act, the only recourse against maximum rate statutes would have been through bills for injunction to prevent their operation on the ground of confiscation of property in violation of the Fourteenth Amendment. Granting the theoretical efficacy of this remedy the economic situation demanded a more certain relief against a further depreciation of railroad credit. Congress intervened in these circumstances to provide specifically that the increased rates in effect on February 29, 1920, (the last day of Federal control) should continue in effect "until thereafter changed by state or Federal authority, respectively, or pursuant to

[27]Legal Tender Case (1884) 110 U. S. 421, 4 Sup. Ct. 122.

[28]Miller *v.* United States (1870) 78 U. S. 268; Tyler *v.* Defrees (1870) 78 U. S. 331; Hijo *v.* United States (1904) 194 U. S. 315, 24 Sup. Ct. 727.

authority of law." Enacted as a part of legislation providing for the termination of the war time status of railroad operation, in fact as a partial remedy of "evils which have arisen from its rise and progress", it is thought that the tendency will be to place the constitutionality of this provision, if it be questioned, upon the war powers, although it also falls within the power of Congress in respect to the regulation of interstate commerce. In form it is essentially a war time measure enacted to promote a successful return to a status of peace. This is emphasized not only by the title designation "Termination of Federal Control", but by other provisions of the same legislation. Thus other sections of the Act forbid reduction in the war time wages for a period of six months, continue the government guarantee of the war time rental to railroad corporations for the same period, and prohibit both the states and the corporations from reducing rates during that period except with the consent of the Interstate Commerce Commission. Still other sections of the Act make provision for the fixation of wage scales in the future and the establishment of a rule of rate making in which recognition is given to the right of railroad companies to earn reasonable profits upon the value of the property devoted to transportation use. In relinquishing the railroads to the owning corporations, Congress acknowledged in this manner a responsibility to the corporations for many of the new conditions which had been necessarily created by the Federal Government as a part of its war time operation.

It may be suggested that the effect of the new limitations under discussion will outlast the period when the Federal Government may function under its war powers, that is beyond a reasonable time after the formal termination of the war. But, as already noted, the *Legal Tender Cases* proceeded upon the theory that a state of facts created by the exercise of lawful authority will continue even after the authority had ceased to function. So here, granting what seems to be indisputable—that the limitations are reasonably appropriate and necessary to permit a successful return to a status of peace—they may be properly sustained under the war powers of Congress. In the event that for any reason this source of power should seem inadequate, the power to regulate commerce is sufficiently inclusive to sustain the limitations upon state power as an appropriate means to a legitimate end.

An examination of the limitations from the viewpoint of statutory construction, their field of operation and their practical effect, serves to strengthen this conclusion.

Continuance of the increased rates is provided by the Act "until *thereafter* changed by State or Federal authority, respectively, or pursuant to authority of law." The latter clause seems to provide for change by the railroad corporations upon compliance by them with the procedural provisions of state or Federal statutes, applicable respectively to intrastate or interstate rates, that is it permits such changes to be made "pursuant to authority of law." The inhibition upon "State or Federal authority" is that the rates should continue "until thereafter changed."

To *thereafter* change an existing status requires an affirmative act, and the provision is so phrased as to indicate the intention of Congress to revest the states with their regulatory powers over intrastate rates, but to avoid the operation of former state statutes and regulatory orders in conflict with a continuance of such rates. There is nothing anomalous in this situation. The pre-existing maximum rate statutes and former orders of regulatory officers had been enacted or made with respect to rates which represented either the voluntary action of the carriers or the result of regulatory supervision by the states. Obviously they could not have contemplated the changed conditions brought about by the war, nor could they operate on rates lawfully made by the dominant and exclusive authority of the Nation. State power of regulation, as is said by the Supreme Court in its most recent decision on the subject, is *derivative* only, arising from the duty of the intrastate carrier to charge only reasonable rates with the co-relative right in the state to exact compliance with the duty.[29] The lawfulness of the increased rates continued in effect by this Act is attested by the fact that they were made by the dominant authority of the Nation; their lawfulness should be presumed to continue until the revested authority of the state shall be asserted through legislative enactment or administrative order to declare them unlawful.

In its legal effect, the Congressional act provides for a revesting of state authority to exact a compliance with such duties in respect to intrastate rates as may rest upon the carriers, but requires that the revested authority shall be exercised only by affirmative act. That affirmative act may consist in the legislative enactment of statutes or the issuance of administrative orders after compliance with the procedural formalities as to notice and hearing. But previously enacted maximum rate statutes in effect at the beginning of Federal control will not constitute such an affirm-

[29]Dakota Central Tel. Co. *v.* State of South Dakota (1919) 250 U. S. 163, 39 Sup. Ct. 507.

ative act in the absence of their re-enactment. It is inconsistent with the theory and statement of the present Federal statute to conceive of the state maximum rate statutes as being merely held in suspense to become operative at the end of Federal control or on September 1, 1920, upon the only lawful rates in existence on that date, which were made by the Nation in complete derogation of such statutes; for the act of Congress provides that these rates shall continue in effect "until *thereafter* changed."

State statutes making the filing of rates or their approval by administrative officers conditions precedent to their validity are likewise rendered inapplicable to the rates in effect at the end of Federal control. Similarly those state regulatory commissions which have had the so-called "suspension power" cannot exercise it in respect to these rates. This power is a statutory authority similar to that exercised by the Interstate Commerce Commission over interstate rates by which when increased rates are filed to take effect at some future time, the Commission may suspend and defer their operation pending investigation as to their reasonableness. An elaboration of this is the provision in Illinois and Nebraska statutes and those of a number of other states forbidding the collection of any increased rate until a justification of the increase shall have been made by the carrier and an order of approval entered by the designated regulatory officers. None of these provisions can under the Congressional act apply to a continuance of the rates in effect at the end of Federal control, for they had previously become operative at a time when they were validated by the constitutional exercise of a National power. It is almost the same situation as has been previously presented when the carriers have sought to increase intrastate rates without securing the consent of the state for the purpose of complying with orders of the Interstate Commerce Commission to remove unjust discrimination between persons using interstate and intrastate commerce respectively. In such cases the states have been held powerless to suspend the rates or to enforce as to them statutes in respect to filing or approval.

"But these provisions (of the state statute in respect to filing and approval of increased rates) cannot be held to apply to changes in intrastate rates over which the Board (of state commissioners) has no control. The proper conduct of business would suggest the giving of some notice, * * * but a valid order of the Commission (Interstate Commerce Commission) is, when applicable, a legal justification for disregarding a conflicting regulation of

the state law—because the Federal authority is dominant." Insertions of parenthetical matter do not appear in original.[30]

In so far as the filing of rates is designed to secure adequate publicity of published charges for the information of the public and the regulating officers, it may seem desirable to the state officers to accept and file them for that purpose. But if a filing of rates already validated is not accomplished it is difficult to understand how an omission in this respect would have any more effect upon the lawful continuance of rates otherwise legalized than a failure to comply with provisions of the Act to Regulate Commerce in respect to posting interstate rates at stations, a failure to post being held not to impeach the validity of the rates.[31]

To review these limitations upon state power over intrastate rates it appears that Congress, by legislative act, has (1) prevented the application of existing maximum rate statutes, of which the two cent passenger fare statutes are typical, and (2) avoided the operation of state statutes respecting the filing, suspension and approval of increased rates by state regulating bodies. Congress has also further temporarily restricted the revested state authority for six months by prohibiting reductions in rates during that period except with the approval of the Interstate Commerce Commission. All of these limitations fall well within the war powers of Congress and its power to regulate interstate commerce as outlined earlier in this discussion.

(*b*) Limitations Dependent on Action by Interstate Commerce Commission

Limitations dependent upon subsequent action of the Interstate Commerce Commission are enacted as amendments to the Act to Regulate Commerce. In so far as pertinent to the present discussion, they are set forth in the margin.[32] These amendments

[30]American Exp. Co. *v.* South Dakota (1917) 244 U. S. 617, 626, 37 Sup. Ct. 656.

[31]Texas & Pac. Ry. *v.* Cisco Oil Mill (1907) 204 U. S. 449, 27 Sup. Ct. 358; Kansas City Southern Ry. *v.* Albers Commission Co. (1912) 223 U. S. 573, 32 Sup. Ct. 316; United States *v.* Miller (1912) 223 U. S. 599, 32 Sup. Ct. 323.

[32]After providing that carriers may file complaints, provision is made in Section 416 of the Transportation Act of 1920, amending Section 13 of the Act to Regulate Commerce, for notice to the state officers whenever intrastate rates are involved in a proceeding before the Interstate Commerce Commission, either instituted on its own motion or upon petition. A method by which the Commission may through joint hearing, or otherwise, utilize the records and facilities of the state officers is also provided. The following additional amendatory paragraph is then added:

have two general effects: (1) They enact into statutory law the judicial construction of Section 3 of the Act to Regulate Commerce in so far as that section relates to discriminations between interstate and intrastate rates, and (2) they amplify the former law by (*a*) permitting carriers to complain of such discriminations, in additions to persons and localities, (*b*) extending the prohibition against such discrimination to specifically include discrimination against interstate commerce as such, this in addition to the former inclusion of discriminations between persons and localities, and (c) authorizing the Interstate Commerce Commission to prescribe the *specific* rate for intrastate application to remove discriminations found to exist, where formerly the power was only to prescribe reasonable maximum rates for interstate application and to order the removal of the discrimination, whereupon the carrier might lawfully put in force the interstate rates found reasonable and raise the state rates to the same level.[33]

It is not within the scope of this article to consider the constitutionality of a delegation of power to administrative officers to prescribe specific rates as differentiated from maximum rates.[34]

"Whenever in any such investigation the Commission, after full hearing, finds that any such rate, fare, charge, classification, regulation, or practice causes any undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful, it shall prescribe the rate, fare, or charge, or the maximum or minimum, or maximum and minimum, thereafter to be charged, and the classification, regulation, or practice thereafter to be observed, in such manner as, in its judgment, will remove such advantage, preference, prejudice, or discrimination. Such rates, fares, charges, classifications, regulations, and practices shall be observed while in effect by the carriers parties to such proceedings affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding.

[33]"Where in the exercise of its delegated authority the Commission not only finds that the disparity in the two classes of rates is resulting in unjust discrimination against interstate commerce but also determines what are reasonable rates for the interstate traffic, and then directs the removal of the discrimination, the carrier not only is entitled to put in force the interstate rates found reasonable but is free to remove the forbidden discrimination by bringing the intrastate rates to the same level." Illinois Central R. R. *v.* Public Utilities Commission of Ill. (1918) 245 U. S. 493, 506, 38 Sup. Ct. 170.

[34]The suggested differentiation appears to have given the courts no concern. See Louisville & N. R. R. *v.* Garrett (1913) 231 U. S. 298, 305, 34 Sup. Ct. 48; and cases there cited, where it is declared without qualification in this respect that a state legislature may constitutionally "commit the authority to fix rates to a subordinate body". See also the dictum that "Congress might itself prescribe the rates; or it might commit to some subordinate tribunal this duty"; Interstate Commerce Commission *v.* Cincinnati, N. O. & T. P. Ry. (1897) 167 U. S. 479, 494, 17 Sup. Ct. 896.

Authority to establish specific rates and minimum rates, referred to in this amendment, is also, by other amendments contemporaneously enacted, delegated for the first time to the Interstate Commerce Commission in respect to interstate rates. Heretofore the Commission's authority had only been to establish reasonable maximum rates. If the new delegation of power is lawful in its broader aspect, that is, as it affects interstate rates generally, no reason suggests itself for its invalidity as a part of the power to regulate interstate commerce by removing discriminations imposed upon it.

The extension of the prohibition against unjust discrimination to include discriminations against interstate commerce as such involves interesting considerations. It may be that this is not a new limitation at all, but merely a restatement of a former one in more direct phraseology. Section 3 of the Act to Regulate Commerce which has been continued without amendment since its first enactment as a part of the original act of February 4, 1887, and under which the Interstate Commerce Commission's authority to disturb state rates has been upheld, provides:

"That it shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

While all of the cases where the exercise of the dominant power of the Nation in respect to intrastate rates which have been presented to the Courts under this section have involved discriminations between *persons* or *localities*,[35] it is to be observed that the section also forbids discrimination between *descriptions of traffic*. Whether the body of intrastate commerce or rates, on the one hand, and the body of interstate commerce or rates, on the other, are descriptions of traffic within this section may have been a debatable question. Against such a suggestion is the fact that this same phraseology was used in the English Act for the regulation of railways dated July 10, 1854, and in the Eleventh section of the act amendatory thereof of July 21, 1873. In England no

[35]Houston, E. & W. T. Ry. *v.* United States (1914) 234 U. S. 342, 34 Sup. Ct. 833; American Exp. Co. *v.* South Dakota (1917) 244 U. S. 617, 37 Sup. Ct. 656; Illinois Central R. R. *v.* Public Utilities Commission of Ill. (1918) 245 U. S. 493, 38 Sup. Ct. 170.

such differentiation could have been in contemplation under the phrase "description of traffic". On the other hand, the existence of the two kinds of commerce in the United States makes possible preferences to one at the expense or prejudice of the other.

This on several occasions has been the subject of comment by the Interstate Commerce Commission. Thus in *1915 Western Advance Rate Case*[36] the Commission disapproved an advance in the interstate rates on live stock on the ground that lower intrastate rates had already placed a burden on interstate commerce which would be emphasized by increasing the interstate rates, even though the total revenue from the two classes of traffic was inadequate.

"These statistics offered by the carriers show the revenues from the whole of their livestock traffic, intrastate and interstate. * * * There is no claim made here that the interstate rates on livestock are not adequately remunerative, but rather that the revenues derived both from intrastate and interstate traffic are inadequate. No one denies that the state rates are generally far below the interstate rates; yet the suspended tariffs propose to widen the gulf between the two sets of rates and correspondingly increase the burden on interstate traffic and proportionately lift a burden off the state traffic."[37]

In dealing with a difference between interstate and intrastate passenger fares, the Commission directed attention to another type of discrimination against a description of traffic, i.e., interstate commerce. A passenger fare of two cents a mile prevailed within the state of Illinois, while the fare applicable to interstate travel between points in Illinois and other states was two and one-half cents a mile. It was shown to be a prevalent practice for travelers journeying from Illinois points to interstate destinations to buy intrastate tickets to border line stations, thus securing the benefit of the lower fare, and there rebuying a ticket to destination at the interstate fare. This practice, the Commission said, "reduces the aggregate revenues of the carriers from passenger traffic, and causes to be reported as intrastate, traffic which should be reported instead as interstate."[38]

Again in *Increases in Passenger Fares in Western Territory*[39]

[36](1915) 35 I. C. C. 497.

[37]*Ibid.*, at p. 588. This decision was not in harmony with prior holdings of the Commission (see dissenting opinion), but it was quoted with approval and followed in Live Stock Rates from Points in Colorado, etc., 35 I. C. C. 682.

[38]Business Men's League of St. Louis *v.* Atchison, T. & S. F. Ry. (1918) 49 I. C. C. 713, 715.

[39](1915) 37 I. C. C. 1.

the Commission while permitting increases in interstate fares upon a showing as to the inadequacy of revenue from passenger traffic generally, said:

"This increased revenue which apparently should come from the passenger traffic should not, however, be altogether imposed upon the interstate traffic. Manifestly a person journeying by rail within the boundaries of a state cannot expect to travel at the expense, in any degree, of the interstate passenger. State and interstate traffic should each contribute equitably to the return the carrier is entitled to earn on the value of its property devoted to the passenger service. The revenue of respondents from intrastate passenger traffic within these states is approximately 96 per cent of that from the interstate traffic. While we should permit reasonable interstate fares we cannot sanction fares that are higher than are reasonable for the service performed because intrastate fares are alleged or shown to be unduly low."[40]

While commenting on these discriminations between interstate and intrastate commerce, the Commission did not undertake to order their removal, but restricted its action to cases where it found existent discriminations between persons or localities. Whether the original provisions of Section 3 of the Act to Regulate Commerce included in the designation "descriptions of traffic", prohibitions against discriminations between the two kinds of commerce was never passed upon directly by either the Commission or the courts. This may have been due to the fact that the cases which arose under the section were presented upon the complaint of either shippers or localities, and these classes of complainants were interested primarily in demonstrating alleged preferences to competing shippers and localities, rather than possible discriminations between descriptions of traffic as such. Discriminations of the latter sort had their primary effect upon the carriers themselves, though indirectly they affected also the users of interstate and intrastate rates, respectively, and often in a decided manner.

The correct interpretation of Section 3 as it stood alone has become largely a question of academic interest in view of the new legislation. Presumably the evil effects of a disparity in rate levels as previously noted by the Commission were among the considerations which actuated Congress in enacting the present amendment to the Act. Carriers are now given the express right to file com-

[40] *Ibid.*, at p. 41. As to the objection that the carriers had failed to segregate their cost studies between intrastate and interstate passenger service, the Commission said at p. 30: "The intrastate and interstate passenger service is intermingled. It is largely done upon the same trains over the same roadbed, with the aid of the same employees."

plaints against the alleged discriminatory character of intrastate rates. Discrimination between the two descriptions of traffic, interstate and intrastate, is definitely prohibited in express terms. There is no reason to doubt the constitutionality of the amplification of power and the new limitation upon the states, for the power to regulate interstate commerce, as outlined earlier, includes within its scope the power to regulate effectively and to prevent interference with such regulation.

By other sections of the Transportation Act of 1920 the Interstate Commerce Commission is directed to initiate rates so as to produce a "fair return" upon the aggregate value of railroad properties considered as a whole or in groups.[41] This direction contemplates a rate scheme which will produce an adequate total revenue from the combined interstate and intrastate operations of carriers. A separation of value or accounts as between interstate and intrastate service is neither required nor permitted within this section. In these circumstances, it is at once apparent that low intrastate rates will necessitate higher interstate rates to produce the desired total return and that a difference in rate levels between these two descriptions of traffic will constitute a real burden and discrimination. This recognition in the Transportation Act of the carrier's right to a fair return upon the value of its total property devoted to transportation uses is clearly an announcement by Congress that there has been such an "interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former." And to further quote from the language of *The Minnesota Rate Cases,* Congress has determined "the measure of the regulation it should supply" by forbidding unjust discriminations against interstate commerce caused by intrastate rates. Upon determination by the Interstate Commerce Commission of the existence of such a discrimination it may now order its removal. This exercise of power would seem to be well within the definition of authority set forth in *The Minnesota Rate Cases,* representing as it does a determination by Congress of "the measure of regulation" of intrastate rates necessary "to conserve and promote the interests of interstate commerce." What circumstances will be considered by the Interstate Commerce Commission as sufficient warrant for the exercise of this added control, can be disclosed only by the future.

[41]Transportation Act, 1920, Section 422.

If one might be permitted to predict at all it would be that there will be a general acquiescence by the states in the necessity of keeping the Nation's commerce free of such discriminations, now that Congress has expressly prohibited them, and that it will be necessary for the Interstate Commerce Commission to exercise its added power in this respect in comparatively few instances. One consideration which leads to this conclusion is the grave consequence which may ensue to state regulation in the event that the state should persist in continuing discriminations forbidden by Congress. Under the new Transportation Act, the Interstate Commerce Commission upon finding the existence of such discrimination may not only order its removal in general terms, but may prescribe the specific rates to be applied for its removal, and the order prescribing these rates by virtue of another section of the same Act may "continue in force until its further order, or for a specified period of time, according as shall be prescribed in the order."[42] The possible consequence therefore of a state levying discriminations upon interstate commerce or its users, or permitting such discriminations to exist in violation of the prohibition of Congress, is that the Interstate Commerce Commission in a proper case may deprive the state of all future regulation of such rates as constitute the violation for an indefinite period.

This survey of the limitations upon state power to regulate intrastate railroad rates warrants the conclusion stated at the outset,—that their constitutionality rests upon established principles well marked by judicial decision. Included within the power of Congress to regulate interstate commerce is its power to exert such control over the intrastate operations of interstate carriers as is necessary to make its regulation of the former effective and adequate. It is for Congress to declare what measures of control are necessary for the legitimate end of functioning under its enumerated power of regulating interstate and foreign commerce. No reason suggests itself for now denying that Congress might lawfully have declared it necessary for the Nation to have completely occupied the entire field of regulation, but Congress has merely declared that such occupation shall become complete in the event that the states create unjust discriminations or permit them to exist.

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[42]Transportation Act, 1920, Section 418.